Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

~~77-~~875

Current Case No. 77-602

WILLIAM T. RANKIN,
Appellant-Petitioner.

v.

STATE OF OHIO,
Appellee-Respondent,

On Appeal From the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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November 11, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Current Case No. 77-602

WILLIAM T. RANKIN,
Appellant-Petitioner.

v.

STATE OF OHIO,
Appellee-Respondent,

On Appeal From the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

The petitioner, William T. Rankin, prays that his leave to appeal be granted to review the dismissal of his Appeal by the Supreme Court of Ohio rendered in the proceedings on September 9, 1977.

OPINIONS BELOW

The order of the Supreme Court dismissing the appeal sua sponte, (Case No. 77-602) which is not reported appears herein in Appendix *infra* Pages 15 and 16.

This memorandum and judgment entry opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio appears herein in the appendix, *infra* pages 17-22.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a criminal action in which the State of Ohio is prosecuting the Appellant-Petitioner for possession of narcotics, having a concealed weapon and having a weapon under disability. Appellant brought a Motion to Suppress Evidence which was held in the Hamilton County Common Pleas Court on January 13, 1976 before the Honorable William A. McClain. At the conclusion of the hearing, Judge McClain granted the Appellant-Petitioner's Motion to Suppress Evidence.

Pursuant to Ohio Rev. Code 2945.67 through 2945.70, the Hamilton County Prosecutor appealed the granting of the Motion to Suppress Evidence. Judge McClain pursuant to O.R.C. 2945.69 appointed Ronald Morgan, Esq., attorney for the defendant William T. Rankin, to argue the case in the Appellate Court against the Prosecuting Attorney. In a "Memorandum Decision and Judgment Entry," (attached in Appendix) filed March 30, 1977 the Court of Appeals, First Appellate District, Hamilton County, Ohio reversed the decision of the trial court and remanded the case to the Court of Common Pleas for further proceedings.

Appellant filed an Application to Intervene for purposes of Appeal in the Court of Appeals on April 25, 1977. Counsel for Judge McClain withdrew and counsel for William T. Rankin was substituted on April 27, 1977, for the

purpose of perfecting this Appeal to the Ohio Supreme Court.

This Appeal was taken to the Supreme Court of Ohio and filed on May 27, 1977. The Supreme Court of Ohio affirmed the decision of the Court of Appeals by dismissing and holding that there was no substantial constitutional question involved.

(ii) The judgment, decree or final order, sought to be reviewed is the ruling of the Supreme Court of Ohio dismissing the appeal for the reason that no substantial constitutional question existed. The latest order of that Court dismissing the appeal was issued and entered on September 9, 1977. The Notice of Appeal was filed in the Supreme Court of Ohio, the Court possessed of the record on November 8, 1977.

(iii) Jurisdiction of the Appeal is conferred on this Court by 28 U.S.C. 1257 (2).

(iv) Cases sustaining the jurisdiction of this Court are: *Cox Broadcasting* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975), and *Mayer* v. *City of Chicago,* 404 U.S. 189, 92 S.Ct. 410 (1971), *Douglas* v. *People of California,* 372 U.S. 353, 835 S.Ct. 814 (1963).

QUESTIONS PRESENTED BY THE APPEAL

The following are the questions presented by the appeal:

1. Is the decision of the Supreme Court of Ohio dated September 9, 1977, dismissing the appeal on a finding of no substantial constitutional question a final and appealable order?

2. Do O.R.C. § 2945.67 through § 2945.70, which grant a Prosecuting Attorney but not a trial court judge or a defendant the absolute right to an appeal on an interlocutory order by the Court of Appeals, deny the defendant equal protection and due process of the law which is prohibited by the United States Constitution?

3. Do O.R.C. § 2945.67 through 2945.70, deny the appellant his right to effective assistance of counsel in that the defendant's position is argued at the appellate level by counsel, who represents the trial court judge, is chosen by the trial court judge and paid by the trial court rather than counsel of defendant's own choosing?

4. Did the Ohio Supreme Court err prejudicially to the appellant when that Court upheld the decision of the Court of Appeals, First Appellate District, Hamilton County, Ohio, which overruled defendant's Motion to Suppress by dismissing defendant's Appeal on the grounds that no substantial constitutional question was presented?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right . . . (and) to have the assistance of counsel for his defense."

Constitution of the United States, Amendment XIV:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS OF THE CASE

Appellant-Petitioner, William T. Rankin, was arrested on August 16, 1975 for possession of narcotics, having a concealed weapon, and having a weapon under disability. At the hearing on the Motion to Suppress in the Hamilton County Court of Common Pleas, much confusing and contradictory evidence was presented. At the conclusion of the hearing the defendant's Motion was granted by Judge William A. McClain.

The Hamilton County Prosecutor, pursuant to Ohio Revised Code 2945.67 through 2945.70, appealed the granting of the Motion to Suppress Evidence. Judge McClain

pursuant to Ohio Revised Code 2945.69 retained Mr. Ronald Morgan, esq., Attorney for the petitioner to represent the trial court at the appellate hearing. Briefs were filed by both sides and in a "Memorandum Decision and Judgment Entry" (see Appendices) filed March 30, 1977, the Court of Appeals, First Appellate District, reversed the decision of the trial court and remanded the case to the Court of Common Pleas for further proceedings according to law.

Appellant filed an Application to Intervene for purposes of Appeal in the Court of Appeals on April 25, 1977. Counsel for Judge McClain withdrew and counsel for William T. Rankin was substituted on April 27, 1977 for the purpose of perfecting an Appeal to the Ohio Supreme Court.

Briefs were filed in order to show probable jurisdiction in the Ohio Supreme Court. The Supreme Court however, dismissed the appeal on the grounds that the case lacked substantial constitutional question on September 9, 1977.

Consequently, this appeal is filed with the United States Supreme Court because of the apparent constitutional conflicts caused by Ohio Rev. Code 2945.67 through 2945.70.

The federal questions sought to be reviewed were raised at various times. This was necessary because of the nature and procedure of the Ohio statutes. The question as to the admissibility of evidence was of course raised by the Motion to Suppress heard in the trial court on January 13, 1976.

The equal protection, due process and effective assistance of counsel questions, were raised by Appellant-Petitioner's brief to the Ohio State Supreme Court. The right of appeal given to the Prosecuting Attorney of Hamilton County mandates that these issues be first raised in the appellate proceedings.

The question of a final and appealable order was raised in the Appellant's brief to the Ohio Supreme Court. This was dictated by the Ohio Statute giving the Hamilton County Prosecutor an absolute right to appellate review of the order granting petitioner's Motion to Suppress.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The Ohio Supreme Court by upholding the decision of the Court of Appeals, First Appellate District, Hamilton County, Ohio has sustained a state statute which was attacked on the basis of its repugnancy to the United States Constitution. By upholding this statute, the Supreme Court of Ohio has denied the Petitioner his 5th, 6th and 14th amendment rights. In addition, the determination of probable cause to search which was made by the Ohio Court of Appeals, does not measure up to the constitutional guidelines which are set forth in various opinions of the Supreme Court. These questions now presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

NOTICE OF CONSOLIDATION – Argument for questions one through three will be consolidated for the sake of brevity and because of the unique nature of the Ohio statute.

Before the enactment of Ohio Rev. Code 2945.67 through 2945.70, a ruling on a defendant's Motion to Suppress Evidence was considered an interlocutory order and inter-

locutory orders are not appealable in Ohio criminal cases. *State* v. *Stark,* 90 O.A.2d 42 (1966). The enactment of these sections of the Ohio Rev. Code in 1965 made an order granting a Motion to Suppress, a final and appealable order pre-trial. In these cases, an Ohio Prosecutor is permitted to go directly to the Court of Appeals without first taking the case to trial. The statute also allows a prosecutor who fails to prevail in the Ohio Court of Appeals to go directly on appeal to the Supreme Court of Ohio. This indicates that the judgment of the Court of Appeals whether it reverses or upholds the trial court is also a final and appealable order. By the Ohio Rules of Criminal Procedure the State must certify pursuant to Ohio Criminal Rule 12 (J) that:

> ". . . (2) granting of the Motion has rendered the States proof with respect to the pending charge so weak in its' entirety that any reasonable probability of effective prosecution has been destroyed."

The Prosecution so certified in this case. In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975), this Court determined to use a pragmatic approach in deciding what is a final and appealable order. The final judgment rule generally precludes Supreme Court review where anything further remains to be decided by a state court, no matter how dissociated from the federal issue. However, as this Court noted that rule is not to be applied in a mechanical fashion and there are circumstances in which there has been a departure from this rule of finality. There are cases in which the highest court of a state has finally determined the federal issue involved, with further proceedings in the lower state courts to come. This case presents the same kind of facts. Petitioner-Appellant's constitutional Motion to Suppress has been overruled by

the highest state court. Also, his challenge to an Ohio Statute on constitutional grounds has been dismissed as insubstantial. This set of facts fits into at least two categories set out in *Cox* (supra). This court in *Cox* (supra) said, that an order is final and appealable, if regardless of the outcome of the future state proceedings, the federal issue will survive and require decision. [It is important to note that in cases involving Motion's to Suppress, that in 95% of the cases in which the evidence is not suppressed, a conviction results.] Another category of case which has been found to be appealable are those cases in which the federal claim has been finally decided by the state's highest court but later review of federal issues cannot be had in the state court. This case squarely rests on this category. Appellant-Petitioner has exhausted his right to review on the issue of tainted evidence. The issue has been decided by the highest state court. To force Petitioner to go to trial at this point will place him in a rather unenviable position. Any subsequent error which may occur at the trial level will have to be appealed through the state court system. His appeal on the Motion to Suppress, however, will necessarily have to be taken directly to the United States Supreme Court. The moving force behind these categories and decisions of the Supreme Court has been that "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice . . ." *Radio Station W.O.W. Inc.,* v. *Johnson,* 326 U.S. 120, 124 (1945). In addition to the categories listed above, the Supreme Court discussed the category which was crystalized by *Mills* v. *Alabama,* 384 U.S. 214 (1966). In this category, the federal issue is generally held to be conclusive of the outcome of the case. It does not take a great stretch of the imagination to see that the instant case also fits into this category. The state has certi-

fied by affidavit that its case is so weak as to be unable to proceed without the evidence previously suppressed. If the motion were sustained through the whole proceeding, the state by its own admission would have no case. It is clear that this court by deciding this issue is to a very large extent deciding the whole case. There is absolutely no reason why the Appellant-Petitioner herein should be forced to go through the expense, degradation and trauma of a trial in order to be allowed to appeal the issue of the introduction of illegally seized evidence on direct appeal to the United States Supreme Court.

The Ohio legislature by enacting Ohio Rev. Code 2945.-67 through 2945.70, has granted the right to "interlocutory" appeal on certain matters to the state. There is no reason why the defendant should not have the same right of appeal. This proposition is a reiteration of the oft-stated opinion of the United States Supreme Court that the state has superior resources and access to money and a defendant should receive as much protection as possible under the constitution. *Gideon* v. *Wainwright,* 372 U.S. 346 (1963). In *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971), the Supreme Court stated:

> "Once states have established avenues of appellate review, these avenues must be kept free of unreasoned distinction that can only impede open and equal access to the courts."

This principle has been followed in a number of federal cases, among them *Sierra Melendez* v. *Rivera Brenes,* 331 F Supp. 898 (1971).

> "No one has a constitutional right to appellate review but if a state statute grants that right, the Equal Protection Clause of this Amendment requires uniformity of opportunity to appeal."

In the Ohio case, *Wilms* v. *Klein,* 49 N.E.2d 79 (Ct. of App. 1942), the Court in construing certain Illinois cases concerning the right of appeal noted:

> "All that these cases decided, as we understand them, was that a statute which gave a right to appeal to one litigant and denied it to another would be 'special legislation' and obnoxious to the Constitution." *Wilms* at 80

Appellant contends that Ohio Rev. Code § 2945.67 through § 2945.70 is special legislation, obnoxious to the constitution because it does not give him an equal right with the State to Appeal rulings on Motions to Suppress Evidence. To legislate that a Motion to Suppress is a final and appealable order for the Prosecution but not for the Defendant is a violation of the Equal Protection clause of the 5th and 14th amendments.

Under this Ohio statutory scheme, Ohio Rev. Code § 2945.68 grants the trial court judge the right to appoint an attorney to represent the Court at the appellate level. This statute is plainly and on its face a violation of the 6th amendment right to counsel which is granted to an accused and also a violation of the due process clause of the 14th amendment. The statute sets up a system wherein the accused, whose constitutional rights are being debated, is not even present at the appellate level. He cannot appear himself nor can counsel of "his own choosing" make an appearance on the state's appeal. It has been held since *Douglas* v. *State of California,* 37 U.S. 353, 83 S.Ct. 814 (1963), that the right to counsel on appeal, one of the critical stages of the criminal proceedings, is a right which cannot be denied to the accused by the state since a denial of the right will invariably deny a fair trial. The State of Ohio has devised a scheme of appellate procedure that not only denies a defendant his right to counsel but also denies

him the right to appear at a hearing at which his rights are being decided, a hearing which is clearly a 'critical stage' of the criminal proceedings. This Ohio statute is unconstitutional and should be overturned on the basis of the 6th and 14th amendments as they apply to this petitioner in this case.

4. Did the Ohio Supreme Court err prejudicially to the Appellant when that court upheld the decision of the Court of Appeals, First Appellate District, Hamilton County, Ohio which overruled defendant's Motion to Suppress.

The facts of this case disclose that Appellant was arrested without a warrant, probable cause being founded almost exclusively on the word of an informant corroborated as to one detail. The United States Supreme Court has ruled that the necessary standard of probable cause in the case of warrantless arrests is higher than the standard of probable cause in cases involving arrest pursuant to a warrant. *Beck* v. *Ohio,* 379 U.S. 89, 85 S.Ct. 22 (1964). In *Aquilar* v. *Texas,* 378 U.S. 108, 841 S.Ct. 108 (1964), and *Spinelli* v. *U.S.,* 393 U.S. 410, 89 S.Ct. 584 (1969), this court set forth the standards whereby an informant's word can be relied upon to establish probable cause. The instant case is very similar to *Aquilar,* except that *Aquilar* was a case involving a warrant. The informant's cases generally stand for the proposition that in addition to the informant's word, the police officer must set forth facts showing where the informant got the information and why the officer believed it to be reliable. In this case, neither of these standards was met and yet, the Court of Appeals ruled that probable cause to arrest did exist.

In *Draper* v. *U.S.,* 358 U.S. 307, 79 S.Ct. 329 (1959), an informant's word was relied upon to establish probable

cause for a warrantless arrest. This court noted in *Draper* the importance of the detail in the informant's description. Also, the court noted that the police officer verified each detail before arresting Draper. Unlike *Draper* (supra) there was a paucity of detail supplied by the informant in the present case which is an indication that the information could have come from "rumors circulating in the underworld." The so-called information which was used to establish probable cause to arrest was the presence of two cars bearing out of state license plates at the scene of the arrest, a fact which the officers or the informant could have established by personal observation.

The Ohio Court of Appeals has by its ruling relaxed the standard set forth in *Draper* and thereby overruled the Supreme Court's interpretation of the 4th Amendment to the United States Constitution.

CONCLUSION

The decision of the Ohio Supreme Court in refusing to hear the Appeal of William T. Rankin is a denial of the rights guaranteed by the Equal Protection clause of the 14th Amendment of the United States Constitution. In addition, Ohio's statutory scheme granting the right of Appeal to the prosecutor is a final, appealable order. This statutory system denies the defendant due process and effective assistance of counsel as guaranteed by the 6th and 14th Amendments. In addition, the Ohio Appellate Court has failed to properly apply the 4th Amendment rights regarding search without a warrant. Therefore, the Defendant-Appellant-Petitioner moves this, the Supreme Court of the United States, to take his case on Appeal, with briefs and oral arguments to be submitted on the merits.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: September 9, 1977

No. 77-602

STATE OF OHIO,
Appellee,
vs.
WILLIAM T. RANKIN,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for Hamilton County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Dominic J. Mastruserio.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 30th day of November 1977

THOMAS L. STARTZMAN, Clerk
/s/ SAM F. ADKINS, Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: September 9, 1977

No. 77-602

STATE OF OHIO,
Appellee,

vs.

WILLIAM T. RANKIN,
Appellant.

APPEAL FROM THE COURT OF APPEALS
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 30th day of November 1977

THOMAS L. STARTZMAN, Clerk
/s/ SAM F. ADKINS, Deputy

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-76045

STATE OF OHIO,
Plaintiff-Appellant,

vs.

WILLIAM THEODORE RANKIN,
Defendant-Appellee.

MEMORANDUM DECISION AND JUDGMENT ENTRY

(Filed March 30, 1977)

Messrs. Simon L. Leis, Jr., Thomas P. Longano and Carl W. Vollman of counsel, 420 Hamilton County Court House, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. Ronald C. Morgan, 138 E. Court Street, Suite 1019, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon tne appeal of the State of Ohio by leave of this Court first granted, the transcript of the docket and journal entries, the original papers from the Court of Common Pleas of Hamilton County,

Ohio, the assignment of error, the briefs and arguments of counsel.

The singular assignment of error is:

> "The trial court committed prejudicial error when it granted the defendant's motion to suppress the evidence."

The defendant-appellee, William Theodore Rankin, was charged in a three count indictment with the crimes of having a weapon under disability, carrying a concealed weapon and possession of a narcotic (heroin) for sale. After pleading not guilty to those charges, Rankin filed motions to suppress the evidence which had been both seized from him and otherwise recovered at the time of his arrest by police officers without a warrant. A hearing had upon the motions resulted in an order suppressing a certain gun, knife and a quantity of heroin, thus prompting the prosecution to seek leave of court to appeal.

The transcript of the proceedings establishes that certain police officers received advice from an informant, characterized as reliable and who had provided information earlier which had resulted in the seizure of heroin and a subsequent conviction, that a shipment of heroin was due to arrive in Cincinnati from California on August 15, 1975, to be delivered to one Fred Douglas. The informant stated that two vehicles would be involved, one a Cadillac sedan with an antenna affixed to its trunk lid bearing California license plates and the other to be operated by someone from Tennessee, which were to meet at Douglas' home in an area suburban to Cincinnati. One of the officers receiving the information knew Douglas and the location of his home. Additionally, the informant stated that the defendant-appellee, referred to by him as "Chipper" Rankin, was to receive part of the shipment of heroin.

At some time between 10:00 and 11:00 P.M. on August 15th, the officer to whom the information had been conveyed went to the vicinity of Douglas' home and saw two vehicles which matched the descriptions given. At about 1:30 A.M. on August 16th, that officer arrived at Rankin's house and shortly thereafter saw, with the aid of binoculars, Rankin apparently engage in a telephone conversation and almost immediately thereafter observed him leave in an automobile bearing a license numbered CHIP 5.

Rankin was followed by the officer to Douglas' home, which he entered. The officer testified that Rankin was then empty handed. Some fifteen minutes later, Rankin left the house hurriedly carrying a package somewhat larger than the hand in which he held it.

By radio, the officer summoned other police and followed Rankin's car as it left the scene. What was characterized by the police as a "high speed chase" developed.

While being pursued, Rankin at one point slowed his car to some 5 MPH and then accelerated. Shortly thereafter, the police were able to stop Rankin.

They testified that when they reached the side of Rankin's car he had a switchblade knife in his hand and was leaning toward the glove compartment. Rankin was disarmed of the knife and a loaded .38 caliber revolver, later test fired and found to be operable, was recovered from the compartment. The officers testified that after his arrest Rankin was advised of his constitutional rights and then told them that he carried the gun for protection.

One of the police searched the area in which Rankin had sharply reduced the speed of his car and returned with a paper sack containing packets holding 3.6 ounces of a substance later found to be heroin.

On his own behalf, Rankin claimed that he had left his home about midnight on August 16th to go to a party

at Douglas' home but remained there only fifteen minutes because it "wasn't any hip." When he left, he became aware he was being followed and increased the speed of his car accordingly. He testified that after being stopped he was "jerked" from his car by men dressed in civilian clothing and told he was under arrest for possession of narcotics. He denied having a knife in his hand, claiming that it was under the passenger seat of the car, and that the revolver was removed from a locked glove compartment.

On cross-examination, Rankin denied ownership of the knife, the gun, the automobile he was driving, and asserted he had never seen the heroin before it was brought back by the police. He admitted he knew of two of the arresting officers from earlier contacts with them as policemen and that he had been convicted of a state or federal offense.

To contradict the assignment of error, the appellee argues that the police upon the facts in the case lacked probable cause to arrest him principally because they did not know that the heroin was in fact at Douglas' home; that there were no exigent circumstances justifying the warrantless search of the car he had been operating and that the illegality of the arrest and subsequent search invalidated the seizures of the evidence.

Our examination of the record convinces us that the information supplied the police meets the test for sufficiency to establish probable cause to arrest without a warrant. That test is set forth in *State* v. *Timson* (1974), 38 Ohio St. 2d 122, the first syllabus of which in pertinent part is:

> "... To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused ..."

When the testimony adduced upon the hearing of the motion to suppress is assessed in its entirety it is manifest that vastly more than mere suspicion motivated the police to make the arrest and that they acted as reasonable, prudent and experienced officers.

Similarly, we believe that the totality of the circumstances revealed in the record justify the conclusion that exigencies existed which necessitated the search incident to the arrest. When it is given that police observed the appellee act as they testified he did, some of which actions are admitted by him, the search of the car and the area within the immediate control of the appellee was justified to prevent the possible destruction or spiriting away of evidence. See *Chambers* v. *Maroney* (1970), 399 U.S. 42; *Chimel* v. *California* (1969), 395 U.S. 752; *United States* v. *Robinson* (1973), 414 U.S. 218.

With respect to the heroin recovered by the arresting officers, the record justified its seizure either on the theory that it was in the plain view of the police having been found on the sidewalk adjacent to the street upon which Rankin's vehicle had been stopped or because it was abandoned property in which Rankin disclaimed ever having had any possessory right or interest. Clearly, there could be nothing unlawful in the officers' appropriation of the heroin if it was in fact abandoned, a conclusion we believe in the case *sub judice* to be inescapable. See *State* v. *Brown*, No. C-74256 (1st Dist., July 21, 1975) citing *United States* v. *Colbert* (5th Cir. 1973), 474 F.2d 174 and *Abel* v. *United States* (1960), 362 U.S. 217.

We find that where, as here, evidence of probative value establishes that a warrantless arrest was made by police upon information from a reasonably trustworthy source verified by their independent investigation and that a warrantless search of an area of an automobile being driven

by the person arrested immediately before his apprehension, that area being accessible to him, resulted in the recovery of a knife from that person's hand, a loaded, operable revolver from the area searched and heroin either in plain view or constituting abandoned property, a court errs in granting a motion to suppress that evidence so seized.

Resultantly, we find the assignment of error to be well taken.

The order of the Court of Common Pleas of Hamilton County granting the motions of the defendant-appellee, William Theodore Rankin to suppress the evidence is reversed and this cause is remanded for further proceedings according to law.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by his counsel, excepts.

SHANNON, P. J., BETTMAN and CASTLE, JJ.

OHIO RULES OF CRIMINAL PROCEDURE

Rule 12

(1) **At the discretion of the prosecuting attorney.** At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of his intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subsection (B) (3).

(2) **At the request of the defendant.** At the arraignment or as soon thereafter as is practicable the defendant may, in order to raise objections prior to trial under subsection (B) (3), request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Rule 16.

(E) Ruling on motion. A motion made before trial other than a motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(F) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if he is entitled to lawful possession thereof. Such order shall be stayed pending appeal by the state pursuant to Rule 12 (K) [12 (J)].*

(G) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the

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* In the 9-1-71 Tentative Draft Crim. R. 12(F) referred to Crim. R. 12(K) which has become Crim. R. 12(J).

time set by the court pursuant to subdivision (C), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver.

(H) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(I) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that his bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under subsections (B) (1) or (2), when such motion raises issues which were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence. The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay, and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

Forms

Motion to Dismiss Complaint, 1 OCP&P 2.03

Entry on Motion to Dismiss Indictment, Information, or Complaint — Prisoner Detained, 1 OCP&P 2.05a

Evidence Notice, Request to Prosecutor for, 1 OCP&P 4.16

Prosecutor's Notice of Intention to use Evidence, 1 OCP&P 4.17

Notice of Alibi, 1 OCP&P 4.20

Motion to Permit Use of Defenses, Objection or Requests not Timely Filed, 1 OCP&P 4.20a

Motions to Suppress, 1 OCP&P 4.37, 4.38, 4.39

[EXCEPTIONS BY PROSECUTING ATTORNEY]

§ 2945.67 Exceptions by the prosecution.

The prosecuting attorney, solicitor, or the attorney general may except to a decision of the court and present a bill of exceptions thereto. The court shall sign said bill and it shall be made a part of the record.

HISTORY: GC § 13446-1; 113 v 123 (192), ch 25; 131 v 682. Eff 11-1-65.

Law Review

Appellate review for the state in criminal cases. (Editorial note.) 22 CinLRev 463.

CASE NOTES AND OAG

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1. RC §§ 2945.67 to 2945.70, inclusive, are unconstitutional insofar as they permit the prosecutor in a criminal case to institute proceedings to review a judgment of the trial court, except where the judgment of such court decides "a motion to quash, a plea in abatement, a demurrer,

or a motion in arrest of judgment," or the equivalent thereof: Euclid v. Heaton, 15 OS (2d) 65, 44 OO (2d) 50, 238 NE (2d) 790.

2. The jurisdiction conferred by GC § 13681 (see now RC § 2945.67) et seq to determine a question of law is proper appellate jurisdiction, although the procedure is to a great extent ex parte, and though the judgment of the supreme court cannot affect the rights of the parties under the judgment of the trial court: State v. Cameron, 89 OS 214, 106 NE 28.

3. The purpose of the bill of exceptions by a prosecuting attorney to the decision of a court is not to obtain a reversal of the judgment of the court in the case in which the bill is taken; its purpose is simply to determine the law to govern in a similar case: State v. Granville, 45 OS 264, 12 NE 803; State v. Simmons, 49 OS 305, 31 NE 34.

4. There is no existing legislative enactment providing for an appeal as of right by the state of Ohio, by the mere filing of a notice of appeal, from a judgment of a common pleas court in favor of defendant in a criminal action, whether or not jeopardy has attached: State v. Pernell, 15 OApp (2d) 221, 44 OO (2d) 423, 240 NE (2d) 870 (1968).

5. The state may appeal from an interlocutory order in a criminal case filed prior to the time defendant was placed in jeopardy, and such appeal, if valid, will not have the effect of a dismissal or an acquittal where such defendant was not placed in jeopardy: State v. Doyle, 11 OApp (2d) 97, 40 OO (2d) 251, 228 NE (2d) 863 (1967).

6. RC §§ 2945.67 to 2945.70, inclusive, are in pari materia, and, insofar as they provide a proceeding for and prescribe a decision of a court of appeals, upon questions

determined by a trial court in a criminal case where jeopardy has attached presented by the prosecuting attorney to the court of appeals by a bill of exceptions filed in the court by leave, which shall not affect the judgment of the trial court in such cause but merely shall determine the law to govern in a similar case, such sections constitute an attempt to enlarge the jurisdiction, as well as the judicial power, of the courts of appeals beyond that prescribed by this section of the Ohio constitution, and are void: State v. Dodge, 10 OApp (2d) 92, 39 OO (2d) 174, 226 NE (2d) 156.

7. Before an appeal on exceptions to a decision may be taken by the prosecuting attorney, or the attorney general, under authority of this section, it is necessary that leave to file such appeal be granted upon motion duly made. A timely-filed notice of appeal does not confer jurisdiction on the appellate court: State v. Meltzer, 4 OApp (2d) 373, 33 OO (2d) 455, 212 NE (2d) 676.

8. The statutes, RC §§ 2945.67 to 2945.69, inclusive, do not require a notice of appeal to be filed when exceptions to a decision of a trial court are sought to be heard by the court of appeals. Where a notice of appeal has been filed, it has no effect as a motion for leave to appeal, and it does not confer jurisdiction on the reviewing court to proceed to hear the appeal: State v. Meltzer, 4 OApp (2d) 373, 33 OO (2d) 455, 212 NE (2d) 676.

9. Rulings as to the admissibility of evidence are not decisions and are not reviewable under this section and RC § 2945.68, independently of the review of a judgment or final order: State v. Hamilton, 107 App 37, 7 OO (2d) 369, 156 NE (2d) 326.

10. The word "decision," as used in this section means

a judgment or final order: State v. Hamilton, 107 App 37, 7 OO (2d) 369, 156 NE (2d) 326.

11. The words "prosecuting attorney" in RC § 2945.67 et seq include the person so designated by a municipality to function in its municipal court in criminal cases, and such officer has the authority to appeal a criminal case decided adversely to the city: Euclid v. MacGillis, 19 OO (2d) 480, 179 NE (2d) 131 (App).

12. The state cannot have a new trial, even though the verdict of the jury does not go to the guilt or innocence of the accused, but its remedy is by exception for the purpose of determining the law for future cases: State v. Thatcher, 12 OD (NP) 715.

§ 2945.68 Application to file bill of exceptions.

The prosecuting attorney, solicitor, or the attorney general may present a bill of exceptions in a criminal action to the court of appeals or the supreme court and apply for permission to file it with the clerk of the court for the decision of such court upon the points presented therein. Prior thereto, he shall give reasonable notice to the judge who presided at the trial in which such bill was taken, of his purpose to make such application. If the court of appeals or the supreme court allows the bill to be filed, the prosecuting attorney, solicitor, or attorney general shall, within ten days of the filing of the bill, file his brief in support of such exceptions and forthwith serve a copy thereof upon the trial judge and any attorney appointed by the judge to argue the exceptions against the prosecuting attorney, solicitor, or the attorney general.

HISTORY: GC § 13446-2; 113 v 123 (192), ch 25, § 2; 131 v 682. Eff 11-1-65.

CASE NOTES AND OAG

See case notes 1, 6 under RC § 2945.67 holding RC §§ 2945.67 to 2945.70 to be unconstitutional.

1. The provisions of this section and GC § 13446-4 (RG § 2945.70) attempt to enlarge the judicial power of the supreme court and to abridge that of the court of appeals, and are therefore void by reason of conflict with Art. IV, §§ 2 and 4 of the constitution of Ohio: Eastman v. State, 131 OS 1, 5 OO 248, 1 NE (2d) 140.

2. Former GC §§ 13682 to 13684 (see now RC §§ 2945.68 to 2945.70) are unconstitutional as far as they confer appellate jurisdiction on supreme court in misdemeanors: State v. Mansfield, 89 OS 20, 104 NE 1001; State v. Cameron, 89 OS 214, 106 NE 28.

3. Former GC §§ 13682, 13683 and 13684 (see now RC §§ 2945.68, 2945.70) confer appellate jurisdiction upon the supreme court in criminal cases to the extent and for the purposes specified in these sections: State v. Cox, 87 OS 313, 101 NE 135 [for opinion below, see 11 NP (NS) 305, 21 OD 535].

4. The provisions of RC § 2945.68, requiring the permission of the court of appeals before a bill of exceptions may be filed, are procedural in nature and are inconsistent with, and superseded by, the rules of appellate procedure: Columbus v. Youngquist, 33 OApp (2d) 317, 62 OO (2d) 456 294 NE (2d) 910 (1972).

5. A motion to dismiss an affidavit is the equivalent of a motion to quash, a plea in abatement or a demurrer and comes within the exception reserved by Euclid v. Heaton: State v. Seta, 16 OApp (2d) 97, 45 OO (2d) 270, 242 NE (2d) 349 (1968).

6. The court of appeals has no jurisdiction to entertain or allow an application of a municipality for leave to appeal a judgment of a municipal court sustaining a demurrer to an affidavit charging a violation of a municipal ordinance and discharging the accused: Toledo v. Crews, 117 App 247, 24 OO (2d) 51, 192 NE (2d) 236 (affirmed 174 OS 253, 22 OO (2d) 290, 188 NE (2d) 592).

§ 2945.69 Appointment of attorney by trial judge.

The trial judge may appoint some competent attorney to argue the bill of exceptions against the prosecuting attorney, solicitor, or the attorney general under section 2945.68 of the Revised Code, and such appointee shall receive for his services a fee of not more than one hundred dollars, to be fixed by the judge and paid out of the treasury of the county in which the bill was taken. Such attorney shall file his brief against the prosecuting attorney, solicitor, or the attorney general within ten days after service upon him of the brief in support of said exceptions. The hearing of such cases shall have precedence of other business and such cases shall be continued upon the docket of the court of appeals or the supreme court until argued and submitted.

HISTORY: GC § 13446-3; 113 v 123 (192), ch 25, § 3; 131 v 683. Eff 11-1-65.

CASE NOTES AND OAG

See case notes 1, 6 under RC § 2945.67 holding RC §§ 2945.67 to 2945.70 to be unconstitutional.

1. The appointment of an attorney as special counsel for a trial judge, under this section, does not disqualify such judge from hearing another case in which such attorney appears as attorney for one of the parties: Longworth v. Schob, 106 App 476, 7 OO (2d) 215, 151 NE (2d) 767.

§ 2945.70 Decision of the court.

If the court of appeals or the supreme court is of the opinion that the questions presented by a bill of exceptions should be decided, it shall allow the bill of exceptions to be filed and render a decision thereon. This decision shall not affect the judgment of the trial court in said cause, nor shall said judgment of the trial court be reversed, unless the judgment of the court of appeals or the supreme court reverses the judgment of the trial court on its ruling on a motion to quash, a plea in abatement, a demurrer, a motion to suppress evidence, or a motion in arrest of judgment. In all other cases the decision of the court of appeals or the supreme court shall determine the law to govern in a similar case.

HISTORY: GC § 13446-4; 113 v 123 (193), ch 25, § 4; 131 v 683 (Eff 11-1-65); 134 v H 511. Eff 3-23-73.

Committee Comment

This section permits the state to appeal an adverse decision on a motion to suppress evidence in a criminal case, on the merits of the particular case. Under former law, the state could appeal motions to quash, pleas in abatement, demurrers, and motions in arrest of judgment on the merits, but an appeal on a motion to quash was permitted only to determine the law to govern in future cases and could not affect the case at bar. See, *State* v. *Collins,* 24 Ohio St. 2d 107, 53 O.O. 2d 302, 265 N.E. 2d 261 (1970).

Comment: See related Crim. R. 12(J).

ALR

Appealability of order arresting judgment in criminal case. 98 ALR2d 737.

CASE NOTES AND OAG

See case notes 1, 6 under RC § 2945.67 holding RC §§ 2945.67 to 2945.70 to be unconstitutional.

1. The state may not prosecute an appeal in a criminal case from an order sustaining a pre-trial motion to suppress evidence: State v. Collins, 24 OS (2d) 107, 53 OO (2d) 302, 265 NE (2d) 261.

2. Provision for supreme court's decision, on exceptions by prosecuting attorney, to determine law to govern in similar cases held valid, except as to portion permitting reversal: State v. Whitmore, 126 OS 381, 185 NE 547.

3. This section is separable, and that part is constitutional which provides that the decision of the supreme court, upon questions determined by the trial court in a criminal case presented by a bill of exceptions filed in the supreme court by leave, shall determine the law to govern in similar cases: State v. Whitmore, 126 OS 381, 185 NE 547.

4. This section, prior to its amendment, 113 v 193, was a valid exercise of legislative power; provisions of this statute can be administered separate and apart from that portion added thereto by amendment: State v. Kassay, 126 OS 177, 184 NE 521.

PROOF OF SERVICE

The undersigned, Attorney for appellant, hereby certifies that a copy of the foregoing was served upon Simon L. Leis, Jr. and Thomas P. Langano, Attorneys, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202 as the Attorney for Appellee by placing said copy in ordinary U.S. Mail on the 7th day of December, 1977.

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